

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-2590

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET M. LANDON

Plaintiff-Appellant

v.

TWENTIETH CENTURY-FOX FILM CORPORATION
and COLUMBIA BROADCASTING SYSTEM, INC.

Defendants-Appellees.

No. 74-2590

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.
as Amicus Curiae

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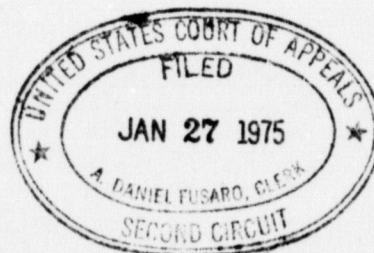


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TWENTIETH CENTURY-FOX FILM CORPORATION :
and COLUMBIA BROADCASTING SYSTEM, INC. :

DEFENDANTS-APPELLEES
-----X

Brief of The Authors League of America, as Amicus Curiae,
In Support of Plaintiff's Appeal from an Order Granting
Summary Judgment Dismissing the Complaint

Interest of the Authors League

The Authors League is a national society of professional writers and dramatists, many of whom have granted motion picture companies the right to produce motion picture versions of their books or plays. The District Court's decision could cause drastic financial injury to some of the authors who have made such contracts. It could deprive them of the valuable television series rights in their works although the contracts were never intended to transfer the rights to motion picture producers. Moreover, the District Court's decision would deprive authors of protection, under the Copyright Act and Antitrust Laws, against "tying" acquisitions imposed by powerful motion picture companies to divest these writers of their renewal copyrights or the ownership of valuable rights during the renewal copyright term.

Because the decision below is of such vital importance to many of its members and other writers, The Authors League respectfully requests the Court's permission to file this brief amicus curiae.

Introductory Statement

Plaintiff contends that Twentieth Century-Fox Film Corporation (herein called "Fox") and Columbia Broadcasting System, Inc. (herein "CBS") infringed her renewal copyright in her book ANNA AND THE KING OF SIAM (the "novel") by producing and broadcasting, in 1972, a series of 13 television programs entitled ANNA AND THE KING. The District Court granted summary judgment dismissing this claim, holding that defendant Fox had acquired the rights to produce the television series under a 1944 contract by which it purchased the right to produce and exhibit motion pictures adapted from plaintiff's successful novel. The District Court also dismissed, by summary judgment, the other causes of action pleaded in the complaint.

The Authors League submits that the District Court's order should be reversed for the reasons set forth in plaintiff's brief, with which we fully concur. This brief is addressed to these points:

1. The District Court erred in determining, by summary judgment, that the 1944 contract transferred plaintiff's television series rights to defendant Fox. At the very least, plaintiff

was entitled to a trial at which all the facts relevant to intention could be developed, and inferences from them properly drawn.

2. The District Court erred in dismissing, on summary judgment, Mrs. Landon's claim that the 1944 transfer to Fox of motion picture or television rights under her 1971 renewal copyright is unenforceable because it resulted from a tying transaction which violated the antitrust laws. This claim is not barred by the statute of limitations, even assuming -- arguendo-- that a claim for damages under the Sherman Act was so barred. If Mrs. Landon's claim were established at a trial, defendants Fox and CBS would have infringed her renewal copyright. She is entitled to a trial at which the facts could be developed concerning Fox's economic position in the market place for motion picture rights in books, the relative bargaining positions of the parties, Fox's practices in demanding the transfer of renewal-copyright rights in transactions for rights under original copyrights, the practices of other motion picture companies in such transactions, and other facts relevant in determining whether the elements of a proscribed tying arrangement were present

1073 renewal copyright (her "renewal rights") was unenforceable

Point I

Interpretation of the 1944 Contract Should Not
Have Been Determined By Summary Judgment

In the 1944 contract, Mrs. Landon granted Fox the exclusive right to make, produce and "motion picture versions" of her novel [Par. FIRST], and the exclusive right to broadcast by television "any of the motion picture versions" of her novel "produced pursuant hereto." The contract limited the rights transferred to defendant Fox to "only the rights hereinabove conveyed and granted" and Mrs. Landon "specifically reserve(d) unto herself all other rights in and to "her novel (Par. THIRD]. In addition, Mrs. Landon "specifically reserve(d) the right to broadcast (her novel) by television direct from living actors" and Fox obtained a perpetual option to purchase from Mrs. Landon her "reserved rights to broadcast (her novel) by television from living actors , or otherwise....."

In 1946 , Fox produced a "motion picture version" of the novel, the feature motion picture ANNA AND THE KING, which was exhibited in theatres and has been broadcast by television. There is no dispute that the motion picture version could be televised; the contract specifically granted defendant Fox that privilege. Thus Bartsch v. Metro-Goldwyn-Mayer 391 F. 2d 150, and similar cases, are not applicable. See Goodis v. United Artists Television, Inc, 425 F. 2d 397.

The dispute concerns the television series of 13 twenty-five minute television programs, ANNA AND THE KING, produced by Fox and broadcast by CBS and its affiliated stations. Mrs. Landon claims that the television series, based on her book, infringed her 1971 renewal copyright in the book. Defendants argue that the 1944 grant to Fox of rights to produce "motion picture versions" of the book also conveyed the right to produce the television series; and that the 1944 grant of rights to broadcast "motion picture versions" of her book also conveyed the right to broadcast the television series.

In accepting their construction of the contract, the District Court in effect ruled that the term "motion picture version", as used in the contract, also meant "television version"; and that when the parties used the term "motion pictures" they intended to include a television series of 25-minute programs created solely for broadcast by television stations.

We submit the District Court erred in deciding these questions on a motion for summary judgment. Their resolution required a determination of the intention of the parties, based on proof of the surrounding circumstances (Meyers v. Selznick Co, 373 F. 2d 218, 222). Evidence of these circumstances and the parties' conduct is essential because they "contract in the environment in which they are brought together and the words they use to express their intentions are of the vernacular and nomenclature of their marketplace." Cave Construction, Inc. v. United States,

For reasons indicated below, we do not believe that the terms "motion picture version" and "motion picture" are used in the relevant marketplaces (or contracts) to mean what the District Court assumed they meant; we do not believe the parties intended to grant Mrs. Landon's television series rights to Fox; and we do not believe the contract did grant those rights. But the critical point is that those questions should not have been decided by summary judgment. "The parties were entitled to have the trier of fact hear evidence as to their intent before deciding the question(s)." Lemelson v. Ideal Toy Corporation, 408 F. 2d 860. The 1944 contract on its face did not grant to Fox the rights it now claims. On the contrary, the District Court reached its conclusion by a pastiche of assumptions and presumptions which could not withstand the test of evidence adduced at a trial. The Court should have denied defendants' motion for summary judgment. And it was not justified in doing otherwise because both sides had moved for that relief, for as usual, their motions do not reflect "agreement on what the 'undisputed' facts are or the permissible inferences to be drawn from them." American Manufacturers Mutual Insurance Company et al v. American Broadcasting-Paramount Theatres, Inc, 388 F.2d 272,279; Janos v. Peck, 21 A.D.529, 536, 251 N.Y.S. 2d 254, 261.

We submit that Mrs. Landon should have the opportunity to submit evidence at a trial to establish the meaning of such terms as "motion picture" and "motion picture version" since these have such a critical bearing on the intent of the parties and the

grant clauses at issue. In the relevant marketplace, the half-hour programs in a television series are not considered or referred to as "motion pictures", whether produced on film, tape or live. They differ not only in length but also in plotting, cost, methods of production -- and in purpose. They are television programs, i.e. comedies or dramas produced especially for broadcasting on television, not for exhibition in theatres. And they are television versions whether prerecorded on film or tape, or broadcast live; just as a dramatic version prepared for radio is a radio program whether broadcast live or from a recording of that version.

This distinction is reflected in various aspects and practices of the marketplace. Thus, when defendant Fox entered into its memorandum of agreement with CBS for the production of the 1972 series, the document -- which set forth the essential terms -- dealt with the production of "programs" for a "series" to be broadcast on "television", not once employing the terms "motion picture", "motion picture versions" or "screen plays". Thus, when the 1972 television series ANNA AND THE KING was broadcast, each program was identified on the television page of newspapers such as the NEW YORK TIMES, as a television program: "ANNA AND THE KING: Comedy-Drama"; by contrast, when the 1946 motion picture

is broadcast, it is listed in the television listings as a "Movie". This is a standard distinction. For example, when DARK PASSAGE (the motion picture) and THE FUGITIVE (the television series) -- the works involved in Goodis v. United Artists Television, supra -- were broadcast in New York On May 22, 1967, T.V.GUIDE listed the motion picture as "Movie-Drama:DARK PASSAGE", while the television program was listed as "Fugitive-Drama".

The clear distinction between the term "motion picture" and the terms "television program" and "television series" are reflected in the policies of the "Academies" of the two industries. Prizes for the best "motion picture" and other accomplishments in the production of motion pictures are awarded annually by Academy of Motion Picture Arts and Sciences [Encyclopedia Britannica, 1968; Vol. 17, p. 917]. Derendant Fox's 1946 motion picture ANNA AND THE KING OF SIAM won an "OSCAR from the Academy for Best Achievement in Art Direction. However, if the 1972 television series had been produced with sufficient excellence to compete for a prize, it would have been nominated for an EMMY - the prize granted by the National Academy of Television Arts and Sciences. The Academy awards an EMMY for the best television comedy series, and one for the best television dramatic series -- whether produced live, on film or on tape. So it was that the Goodis television series, THE FUGITIVE, won an "EMMY" for the year's best "Drama Series" from the Academy for Television Arts and Sciences in 1966, not an "Oscar" from the Academy of Motion Picture Arts and Sciences. (emphasis supplied) Since the early 1950's practically all of these television series which have won prizes from the National Academy for Television Arts and Sciences have been programs pre-recorded on film or tape. (THE EMMY AWARDS, Paul Michael; Crown Publishers, New York; 1970)

The District Court noted that "both the copyright law, 17 U.S.C. Sec. 5, and related regulations ..." define "motion pictures" to include "filmed television plays". This is not correct.

Section 5 lists thirteen classes of works for the purpose of registering claims to copyright. Every claim must specify the class to which it belongs; but the specifications do not "limit the subject matter of copyright", nor do errors of classification invalidate copyright protection. Section 5 does not mention television, nor radio, nor talking pictures, nor sound tape, nor video tape. This is not surprising since it was enacted in 1909, and amended in 1912 to add two classes of motion pictures -- long before Congress was aware of television or other media for which copyrightable works could be created.

The Copyright Office therefore has been obliged to label works, for registration purposes, with the classification tags provided in the 1909/1912 Section. Under its regulations (Sec. 202.6) for example, scripts for radio and television variety programs are registrable in the Class C specified by Congress in 1909 -- "Lectures, Sermons, Addresses (prepared for oral delivery)." But radio and television variety programs are not "lectures" in the real marketplace, and contracts granting rights to produce these programs do not describe them as "lectures". Nor does a contract granting someone the right to deliver a "lecture" based on a book permit him to present a radio or television variety program derived from that work. There are several other instances of this sort in the Regulations; and several instances in which a number of rights which are dealt with as separate property rights in the marketplace are lumped together under one "classification" label by the Act and Regulations. Thus, Class A, Books, does not mention "paperback", "book club" or other rights which are

dealt with separately in the literary marketplace.

Because of the antiquated classification list specified in Section 5, the Copyright Office Regulations provide that television plays recorded on film should be registered under the 1912 heading "Motion Picture Photoplays". But the Act does not provide that the use of this classification for the sole purpose of registering copyright claims defines the terms used in contracts granting rights to produce television programs or motion pictures based on books; the classification does not change the meaning ascribed to these terms by the marketplace or by attorneys, authors, publishers or producers. Indeed, were the Section 5 classifications construed to impose definitions on the terms used in existing contracts, there would be chaos in the motion picture and television industries, and among the principal sufferers and loudest protestors would be the motion picture producers and television networks.

The District Court also seized on the word "sequels" to rationalize its conclusion that the 1944 contract transferred Mrs. Landon's television series rights to Fox. But summary judgment prevents introduction of evidence at a trial to establish that the term "sequel", in the context of the 1944 contract, means a second or third motion picture employing characters or other material from the first motion picture. cf. Bevan, et al v. Columbia Broadcasting System, Inc. et al, 293 F. Supp. 1366, 1367. Moreover, summary judgment prevents the trier of fact from hearing evidence that the term "sequels" is not used to identify

the 13, or 26, or 52, or 104, or more half-hour or hour programs that are produced and broadcast during the life of a successful television series. One example: 120 different episodes of THE FUGITIVE -- the television series involved in Goodis -- were produced and broadcast during its original network "run". (T.V.GUIDE, No. 33, August 19, 1967). A far greater number of programs have been produced during the lives of such television series as GUNSMOKE and BONANZA. Had Fox's 1972 series ANNA AND THE KING been well-produced and received, as many as 146 separate television programs could have been produced during the six years of its 1972 contract with CBS. (By contrast, motion picture sequels, for feature films, are not a common occurrence; and rarely are more than one or two motion picture sequels produced).

Neither the provisions of the 1944 Landon-Fox contract nor the consideration it provided, support the District Court's deductive conclusion that the parties intended the contract to grant the right to make 146 different "motion pictures" from her book, or even a greater number. Nor do the provisions or consideration support the conclusion that the contract was intended to grant the valuable right to produce a series of 13, or 26, or 146, or more television programs -- dramas produced solely for exhibition in the medium of television. Certainly, the plaintiff is entitled to introduce evidence, at a trial, to demonstrate that the lump-sum consideration stipulated in the contract -- no royalties or additional payments are provided for "sequels" or television series -- would be so grossly inadequate if Fox's interpretation were accepted, as to make incredible the assumption that the

parties intended that result. The assumption is all the more incredible since Fox would not be left helpless or injured if plaintiff's interpretation is correct. For Mrs. Landon could not, under the 1944 contract, sell her television series rights without first offering Fox the option to purchase them. Thus, it could profit from the rights if it chose to, and Mrs. Landon would be compensated by Fox or another purchaser for the exploitation of her valuable television rights. On summary judgment, the court below should not have chosen the interpretation which leaves one party so completely at the mercy of the other. cf. Downey v. General Foods Corporation 37 A.D. 2d 250; 323 N.Y.S. 2d 578, 583. Only at a trial could evidence be developed to determine whether the \$67,500 lump sum payment, the sole consideration, was intended solely as compensation for the right to make feature motion pictures based on Mrs. Landon's book, or whether it was also intended (and calculated) to compensate her for television series rights of potentially enormous value.

The District Court concluded that the "only reasonable construction of the 1944 agreement" was that it granted Mrs. Landon's television series rights to Fox. It reached this conclusion by (1) finding the contract gave to Fox "the right to make an unlimited number of motion picture versions of the (book)"; and (2) by assuming that "motion picture versions" included a television series of one-half-hour programs produced solely for broadcasting by television stations. For the reasons indicated in the plaintiff's brief, this interpretation of the contract involves sharp disputes as to facts and inference which cannot be resolved on summary judgment.

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The District Court cited Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F. 2d 150 to support its conclusion that Mrs. Landon and Fox intended that the crucial words "motion picture versions" include a television series produced solely for broadcast by television stations. But Bartsch does not support that assumption. In Bartsch, the company had acquired the right to produce and exhibit motion picture photoplays. The sole issue was whether the right to exhibit a motion picture permitted it to be shown on television as well as in theatres. This Court did not decide that the term "motion picture photoplay" also meant a television series or programs produced for the purpose of broadcasting. It did not decide that whenever a contract granted a motion picture company the right to produce motion picture versions of a book, that right must henceforth be construed to automatically include the separate right to produce television versions of the work. And it did not decide that whenever a contract granted the company only the right to produce "motion picture versions", because that was all the parties intended to convey, the author must also insert a detailed reservation of all the separate television, or radio, or stage rights the parties did not intend to convey -- on pain of otherwise forfeiting them to buyer.

That dogma of construction, which the District Court in effect adopted, is unfounded and totally unfair. Presumptions are to be made on the basis of which party had the "duty" to add language of reservation or limitation, then we submit that the principle adopted by the Circuit Court in Warner Bros. Pictures v. Columbia Broadcasting System must govern. (216 F.2d 945;

cert. den. 348 U.S. 971). Noting that Warner Bros., like Fox, was a large, experienced motion picture producer, the Court said:

"It would seem proper, therefore, to construe the instruments under the assumption that (Warner Bros.) knew what it wanted and that in defining the items in the instruments which it desired and intended to take, it included all of the items it was contracting to take (cases cited)" (at p. 949)

Here, Fox did not include the very rights it now claims to have acquired, the rights to produce a television series based on Mrs. Landon's book.

To avoid this inescapable conclusion, the District Court simply assumed that the term "motion picture versions", as used in the contract, was broad enough to encompass the separate and distinct rights to produce a television series of half-hour programs solely for television broadcasting. The language of the 1944 contract does not give sufficient support to that interpretation to justify imposing it by summary judgment.

Television was well known in 1944, and Fox was aware of the medium. It was also aware that a book could be adapted in separate, different versions for the stage, for motion pictures, for radio, and for television. It was also aware that various books had been used as the basis of a series of weekly programs on radio. And, for the reasons indicated above, it was aware that the rights to produce and exploit these various versions of the same book were dealt with separately in the marketplace, with the author licensing different users to produce and disseminate

the different versions in their separate media. Yet the language of the 1944 agreement supports the interpretation, certainly to the degree required to withstand summary judgment for defendants, that Fox only acquired the right to make motion pictures in the common, marketplace sense of versions produced primarily for exploitation in that marketplace; and that it also received the right to broadcast such versions. All of the language in the grant clauses is geared to such "motion picture versions"; the provisions for changes and alterations, for example, are necessary for the production of theatrical motion pictures, whether or not television rights are also granted. So too, the payment provisions are geared to "general release", i.e. the release of the film to theatres.

Following the grant of the right to make "motion picture versions", the contract very emphatically reserved all other rights to Mrs. Landon (Par. THIRD). This clause alone would have been enough to prompt Fox to insert a specific grant of the right to produce "television versions" or "television programs", if it had intended to acquire those rights -- for the only specific grant it received for the television medium was the right to broadcast "motion picture versions." Moreover, its option to acquire Mrs. Landon's television rights was all encompassing, covering television programs presented from living actors, "or otherwise" (Par. FIRST (f)). The language of the agreement does not support the District Court's conclusion that the additional statement of reservation (in FIRST(f)) concerning live television performances eliminated

all other television rights and transformed them into "motion picture versions". Performances direct from living actors was the principal means of producing television programs in the 1940's and early 1950's; as such it may have merited, in the eyes of the parties, additional mention in Par. FIRST as well as the general reservation in Par. THIRD. This and other possible interpretations can only be resolved at a trial.

Point II

The Allegations that Fox's Attempted Acquisition of Rights Under Plaintiff's Renewal Copyright Was Part of A Proscribed Tying Arrangement and Unenforceable

Paragraph SIXTH of the 1944 contract required Mrs. Landon to convey to Fox those rights under her 1971 renewal copyright identical to those rights under her original copyright, which were granted to it by Paragraph FIRST. Mrs. Landon's second count alleges that this attempted acquisition of rights under her 1971 renewal copyright is unenforceable because it was part of a tying arrangement proscribed by Section 1 of the Sherman Act (15 U.S.C. 1); that Fox required the assignment of her renewal rights as a condition for its acquiring rights under her original copyright. We submit that this count states a good cause of action which plaintiff is entitled to prove at a trial.

Assuming, without deciding, that a tying acquisition of rights under the original and renewal copyrights in a book would violate the antitrust laws if "actual coercion" were exercised, the District Court nonetheless granted summary judgment dismissing the second Count. It concluded (i) that the claim was barred by the four-year statute of limitations [15 U.S.C. 16(b)]; and (ii) that Fox did not "exercise ... actual coercion". We believe the Court erred in both respects.

For reasons indicated below, the claim for damages caused by the tying arrangement is not barred by limitations. But even if it were, the statute does not bar Mrs. Landon's claim for a judgment declaring that the attempted transfer of rights under

her 1971 renewal copyright (her "renewal rights") was unenforceable because it was imposed by a proscribed tying arrangement. Ample precedent establishes that her demand for this relief is timely. If the trial court declared the assignment unenforceable, Fox and CBS would be liable for infringing Mrs. Landon's 1971 renewal copyright when they broadcast the television series in 1972, regardless of what rights Fox acquired under the original copyright. For Fox would not have any enforceable rights to use the novel during the renewal term; and any rights it acquired under the original copyright, even assuming (arguendo) these included the right to produce the series, would terminate when the original copyright expired. G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469; cert. den. 342 U.S. 849.

Before discussing the statute of limitations, we discuss the District Court's conclusion concerning "actual coercion." Although the District Court assumed that a tying acquisition of an author's rights under his original and renewal copyrights could violate the antitrust laws when there was "actual coercion", defendants contended on their motion that such a transaction could not constitute a tying arrangement because -- they claimed -- the original and renewal copyright interests were not "separate products." We address that claim first.

(i) "Buyers", as Well as "Sellers", are Prohibited from Imposing Tying Arrangements

Mrs. Landon contends that the tying arrangement which sought to divest her of her renewal rights was imposed by Fox.

As a "buyer", the party acquiring property, Fox was prohibited by the Sherman Act from initiating a tie-in transaction. For the Act makes tying arrangements illegal whether imposed by a buyer or a seller. Mandeville Island Sugar Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219. It does not "immunize the outlawed acts because they are done" by purchasers. The Act protects "all who are made victims of the prohibited practices by whomever they may be perpetrated..." (at p. 236). Thus, the Supreme Court has held that the antitrust laws are violated when a theater owner - licensee ("buyer") possesses and employs sufficient economic power to exact certain licenses in motion picture copyrights from the motion picture company - licensor ("seller"). United States v. Griffith, 334 U.S. 100.

(ii) An Original Copyright and A Renewal Copyright are Separate Products

On their motion for summary judgment, Fox and CBS contended that an original copyright and a renewal copyright were not separate products, to the extent required for a tying arrangement. Their contention is incorrect. Actually, two separate copyrights, original and renewal, were created by Congress in the Copyright Act for the very purpose of permitting the author to deal with them as "separate products", to avoid having to make a tying "sale" of both copyrights. In drawing the 1909 Act, Congress was urged to adopt a single term of copyright, the author's life and 50 years. However; it decided to retain a two-copyright system, original and renewal copyrights each lasting 28 years, so that if a successful work lives beyond 28 years "it should be the exclusive right of the

author to take the renewal term ..." (H. REP. 2222, 60th Congress, 2d Sess., pp. 14-15).

In Fred Fisher Music Co., v. M. Witmark Sons, 318 U.S. 643, the majority concluded that the Congressional purpose in establishing two separate, successive copyrights in a work was "to enable(d) the author to sell his copyright without losing his renewal interest." (p.656). In short, Congress deliberately established the renewal copyright as a separate property which could be dealt with by the author independently of the original copyright.

In Fisher v. Witmark, the majority held that the rights in a renewal copyright could be legally assigned before the termination of the original copyright term. But the sole question decided was whether the Copyright Act (17 U.S.C. 24) banned all prior assignments of renewal rights. The majority strongly indicated that particular assignments would be denied enforcement by the courts if "made under oppressive circumstances." (318 U.S. at p. 656). Thus, applying Fisher v Witmark, this Court held that a first-term assignment of renewal interests would be held unenforceable for inadequacy of consideration. Rossiter v. Vogel et al., 134 F. 2d 908.

Certainly, an assignment of renewal rights during the original term exacted by a tying arrangement imposed by the assignee-user, in violation of the antitrust laws, constitutes "oppressive circumstances" which render the assignment unenforceable. Moreover, Fisher v. Witmark did not hold that tying assignments of original and renewal copyright interests were immune from the

Sherman Act (indeed the issue of tying assignments was not before the Court). On the contrary, the Supreme Court has frequently held that the Sherman Act prohibits tying arrangements involving copyrights. United States v. Loew's, Inc. , 371 U.S.38; United States v. Paramount Pictures, Inc., 334 U.S. 131

The defendants' contention that an original and renewal copyright are not "separate products" is negated by the Supreme Court's clear explanation that Congress created the two copyrights for the very purpose of making them separate products - so that the author could deal with them separately, selling the original copyright without having to sell the renewal copyright. Moreover, the two separate copyrights meet the test of "product separability" under the tying decisions. The renewal copyright "creates a new estate (which).. is clear of all rights, interests or licenses granted under the original copyright. (cases cited)" G. Ricordi & Co. v. Paramount Pictures, Inc. 189 F.2d 469, 471; cert. den. 342 U.S. 849.

The original copyright in a work can be sold separately from the renewal copyright (ibid); and often is. Thus some authors grant original copyright interests without granting renewal interests. And the renewal copyright is always sold as a "separate product" when the author dies before the renewal year. For in that event, the renewal copyright is secured by his widow and children [or executor, or next of kin]; and they own it outright even though the author may have contracted, during the original term, to assign it to the purchaser of the original copyright. Miller Music

Corp. v. Daniels, 362 U.S. 373.

Often, rights under a renewal copyright will be granted to new users, rather than to those who exploited the work under the original copyright. Frequently uses of the work will be made in the renewal term which were not made in the original term. The markets for the original copyright and the renewal copyright in a work are necessarily different: separated by time, since the renewal rights cannot be exercised until the original copyright expires; and involving different conditions, and transactions with with different licensees and purchasers. We submit that there is a far greater degree of product separability between the original and renewal copyrights in a work than there is, for example, between tickets for pre-season and regular season games of the same football team, in the same stadium, in the same season. Coniglio v. Highwood Services, Inc., 495 F. 2d 1286, 1291(and cases cited at p.1291). The sharp differentiation is magnified by the stark fact that the author's work can only earn income during the first twenty eight year term if he can license rights under the original copyright; rights under the renewal copyright cannot be exercised until twenty eight years hence.

A tying arrangement violates the Sherman Act whether it conveys the original and renewal copyrights outright, or compels a sale of particular rights under both copyrights. Thus, in United States v. Loew's , Inc., 371 U.S. 38 and United States v. Paramount Pictures, 334 U.S. 131, the tying agreements affected licenses of only one of the rights secured by the copyrights involved -- licenses to exhibit the film in theatres (Paramount) or to broadcast

it on television (Loew's). The tying arrangements did not compel the sale or purchase of the copyrights, or of other rights they secured. Usually motion picture companies only acquire particular rights to a book; the author retains title to the copyright and to the publishing, stage and other rights. (Since each of the rights secured by a copyright is a separate article of property, particular rights can be dealt with separately for business, tax and legal purposes). Thus a tying arrangement that compels assignment to a motion picture company of motion picture (or television) rights under both the original and renewal copyrights in a book, creates the same restraints as one which conveys legal title to both copyrights.

Furthermore, as this Court noted in Coniglio v. Highwood Services, Inc., "the factual determination of product separability (is) more appropriate for a trial than for summary judgment." (495 F.2d at p. 1291).

(iii) The Issue of "Actual Coercion"

The District Court ruled that Mrs. Landon could not establish a prohibited tying arrangement unless (1) she only wished to sell the original copyright when she signed the 1944 agreement, (2) "expressed that fact to Fox", and (3) the sale of the renewal copyright was "forced upon her by virtue of the superior economic strength or market dominance of Fox. The Court said these conditions were required by this Court's opinion in Capital Temporaries Inc. of Hartford v. The Olsten

Corporation, 1974-2 Trade Cases, Par. 75,303. The District Court also seemed to read Capital Temporaries as requiring that Mrs. Landon or her agents had attempted to delete the renewal assignment requirement during the 1944 negotiations.

In Capital Temporaries, this Court noted that the "coercive pressure" which makes a tying arrangement illegal may take various forms, including: the "sufficient economic power", as defined in Northern Pacific Ry. (infra), or the tying products "uniqueness" or "desireability", as described in Loew's (infra). However, this Court found that the seller, in Capital Temporaries, did not have market dominance or "sufficient economic power", and its product did not have the requisite "uniqueness" or "desireability", to coerce the plaintiff into accepting a second ("tied") franchise operation. Plaintiff then argued it had been coerced by the language of the contract. It was in this limited context that this Court cited lack of objection from the plaintiff as evidence that the language alone could not have constituted illegal coercion.

We respectfully submit that the District Court erred in its interpretation of Capital Temporaries, and failed to adhere to International Salt Co. v United States, 332 U.S. 392; Northern Pacific Railway Co v. United States, 356 U.S. 1, United States v. Loew's, 371 U.S. 38; and Fortner Enterprises v. United States Steel Corp., 394 U.S. 495. These Supreme Court decisions do not require that the plaintiff must have protested or resisted when the tying arrangement was imposed by a party having market dominance, or "sufficient economic power", or the required product "uniqueness" or "desireability". Certainly, these decisions do not require

the plaintiff must have first voiced objection or sought to eliminate the tied product when the tying arrangement resulted from the existence of that market dominance, "sufficient economic power", "uniqueness" or "desireability".

Moreover, even where the coercive pressure is alleged to have taken some other form, a protest is not required -- as this Court noted -- when it would amount to a "joust with windmills." American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc., 388 F. 2d 272, 285.

Mrs. Landon contended on the motion that Fox possessed the "sufficient economic power" necessary under Northern Pacific, Loew's and Fortner to constitute, in itself, unlawful coercion. She also contended that the tying arrangement resulted from the systematic application of that power. Moreover, we submit there are circumstances, discussed below, which support these contentions, and also indicate that the requisite "uniqueness" existed with respect to the tying element of the transaction, Fox's offer to acquire rights under her original copyright. Moreover, these circumstances support the conclusion that any protest or attempt to eliminate the 1944 renewal assignment provision would have been futile or even hazardous to Mrs. Landon, and would have been a "joust with windmills" that could not be reasonably required of her.

Clearly, a factual dispute remains as to these issues. Fox and CBS did not produce evidence which justified the Court's finding that no issues existed. On the contrary, the Court relied solely on the absence of evidence Mrs. Landon protested, and its own surmises as to whether Fox possessed "market dominance."

In these circumstances, it is well established that summary judgment should not be granted and that plaintiff is entitled to a trial at which these factual issues would be resolved on all the evidence. Polier v. Columbia Broadcasting Co., 368 U.S. 464, 473; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S., 495, 500.

(iv) Fox's "Sufficient Economic Power"

When the 1944 contract was executed, Fox was one of the eight major film distributors in the United States. Schine Theares v. United States, 334 U.S. 110, 115. Indeed, it was one of the "five majors". United States v. Paramount, 334 U.S. 131, 140. Fox, and the other major distributors, distributed "most of the features" in the United States. "For example, during the 1943-1944 season, the eight defendants distributed 77.6% of all features distributed nationally except esterns and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%." Of course, it is common knowledge, that motion picture companies purchase rights in best-selling novels to make feature films, as Fox did with Mrs. Landon's novel, not westerns or low cost pictures.

Fox was not only a major producer of feature films, but an active purchaser of motion picture rights in books and plays for the production of these films. Sixty six contracts in which Fox bought rights to these works were produced during pre-trial proceedings

[JA 14, 150, 185, 365, 417, 450]. These represented but a small portion of the 766 contracts for motion picture rights in literary properties which Fox stated it executed in the 1930's, 1940's and 1950's; and even this total did not include all contracts for the 1930's.[JA118a-o] To handle this substantial business, Fox maintained law departments on both coasts.

Thus, Fox and a few other motion picture companies constituted the sole market place for the sale by authors of motion picture rights in their books and plays. Moreover, Fox's economic power, and position of dominance, in this market was enhanced by the fact that some of the other major distributors were not as actively engaged in buying motion picture rights in books and plays; and by the fact that not every company was interested in acquiring the rights in a particular book or play when it was offered in the motion picture marketplace. This depended on many factors other than the quality of the book itself; e.g., the availability of appropriate stars and directors to the company or its schedule for other forthcoming productions.

By virtue of its position as one of the five majors, its role as a leading purchaser of motion picture rights and these other factors which magnified its economic power -- Fox clearly possessed "sufficient economic power with respect to the tying product" [its purchase of rights under the original copyright in a book or play] "to appreciably restrain free competition in the market for the tied product" [the purchase by others of rights under the renewal copyright to make new motion picture or other versions of the same book or play]. Northern Pacific Railway Co.

v. United States, 356 U.S. 1, 6.

Fox was often the only company to whom an author could sell or lease the motion picture rights under the original copyright in his book or play. If Fox refused to purchase these original copyright interests unless it received a tying assignment of the renewal interests, the author could not earn a cent on his motion picture rights unless he capitulated. Fox's economic power was further enhanced because the other motion picture producers also systematically demanded assignments of renewal rights in contracts for the purchase of motion picture rights under the original copyright.

Fox did systematically apply its economic power, indeed its market dominance, to impose tying arrangements on authors which required them to assign their renewal rights along with their rights under their original copyrights. The paragraph in the 1944 Fox-Landon agreement requiring assignment of her renewal motion picture rights (Par. SIXTH), was a standard clause prepared by Fox and used in its contracts with other authors.* For example, a vast majority -- i.e. 62 of the 66 -- of the contracts introduced in the pretrial proceedings (see p. 27 supra) contained such a clause. Thus, Fox was able to exert its "economic power" over many of the authors with whom it dealt; and these constituted a substantial number of the sellers in the marketplace. Consequently, Fox easily satisfied the Supreme Court's test that it "can exert some power over some

* It appears as Par. SEVENTH in a printed standard contract which Fox prepared for its acquisition of rights in literary properties. JA 147.

of the(sellers) ... in the market..." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502. Moreover, as one of the very few possible buyers in the marketplace, often the only possible buyer, Fox's potential purchase of an author's rights under his original copyright possessed the degree of "uniqueness" and of "desireability" which made it a means of improper coercion when used to impose a tying transaction which compelled the additional transfer of the author's renewal rights.

There is no doubt that the use of Fox's economic power to require the tying acquisition of renewal rights deprived authors of "their free choice" to retain ownership of the renewal rights, the "tied product", and deal with them separately -- selling them at a later time to competitors of Fox. Northern Pacific Railway Co. v. United States, 356 U.S. at p. 6. But preservation of that "free choice", as the Supreme Court noted in Fisher v. Witmark, was the very reason the two separate copyrights were created by Congress.

Fox could only obtain these tying acquisition by coercion of its economic power because they are so damaging to authors. First-term renewal assignments such as Fox imposed on Mrs. Landon prevent the author from earning any income from these uses of her work the second 28 years of its life since no royalties are paid for those uses during the renewal copyright.* The prior assignment

*By contrast, Fox's acquisition of renewal rights is not limited to the right to continue exhibiting motion pictures made during the original copyright term; it also acquires the right to make new motion picture versions during the renewal term.

denies the author any economic benefit from his renewal rights. A fixed sum is paid for the rights granted to Fox. There is no allocation between the original copyright interests and the renewal copyright interests. And in reality, little -- if any -- of the money represents actual consideration for the renewal rights which ultimately may be of great value to their owner. This is one of the issue of fact that should be resolved by a trial. But one indication of this inadequacy of consideration is that the contracts do not provide that a portion of the consideration be paid only when and if the author lives to secure the renewal copyright, so that the motion picture company can, in fact, secure the renewal rights. For should the author die before the renewal year, the company would not obtain them despite the tying assignment clause. Miller Music Corp. v. Daniels, 362 U.S. 373. See p. 21, supra.

A provision for such contingency was not included because Fox used its "sufficient economic power" to compel the author, in a tying assignment, to convey the renewal interests without consideration as a condition of its purchase of rights under the original copyright.

Confronted with Fox's "sufficient economic power" (indeed its dominant position in the market), with its systematic practice of imposing tying assignments of original and renewal interests, and with the same systematic practice by the few other major producers who might some day be interested in acquiring these rights from her, it is obvious that Mrs. Landon would have been "jousting

with windmills" had she or or her agents protested or sought to eliminate the tying assignment of her renewal rights. American Broadcasting-Paramount Theatres, supra; 388 F.2d at p. 285.

Only rarely could an author, usually the most successful and well-established, manage to reserve his renewal rights. And Fox's failure to impose or demand tie-ins in dealings with all authors does not obviate its "sufficient economic power". In International Salt Co. v. United States, the tying clause was not "insisted on in all leases" but that did "not justify the general use of the restriction." 322 U.S. at p. 398. In United States v. Loew's Incorporated, liability was incurred for as few as two tie-in contracts. 371 U.S. at 41-43.

Under the circumstances involved here, it would have been futile for Mrs. Landon or her agent to protest or demand a change. It might even have been hazardous, leading Fox (the only buyer) to withdraw, or weakening Mrs. Landon's bargaining

position on other matters that were realistically negotiable.

It should be noted that the William Morris Agency, Mrs. Landon's agent, could not add to her bargaining strength. Certainly, it could not threaten to withhold the services of its other clients from Fox unless the company allowed Mrs. Landon to retain her renewal rights. If it refused to sell her original rights unless Fox abandoned the tie-in, that-- for the reasons indicated above -- would be tantamount to abandoning the rights. In fact, William Morris, knowing of Fox's systematic practices, would be more likely to recognize the futility of protesting the tie-in. Moreover, as we have noted, protest or resistance is not required of the plaintiff where the tying arrangement is imposed by a party possessing "sufficient economic power".

Whether a "not insubstantial amount of interstate commerce" involved (Northern Pacific Railway Co. v. United States, 356 U.S. at p. 6) is a question of fact to be resolved at the trial. No evidence was introduced by defendants to warrant summary judgment on this issue. Moreover, the relevant figure is the total volume of commerce affected by Fox's tying policy, not the amount involved in its transaction by Mrs. Landon. Fox her Enterprises, Inc. v. United States Steel Corporation, 394 U.S. 495, 502. The many contracts which Fox made with other authors indicates that a substantial volume was involved (see pp. 26-27, supra). And the value of the renewal rights acquired by these tying assignments, measured by the income Fox derived from them in their renewal terms, or by other standards, is "not insubstantial."

When a tying arrangement is illegal, it is not necessary to prove "the actual effect of the tying clauses on competition." Northern Pacific Railway Co. v. United States, 356 U.S. at p.9. Moreover, to the extent that effect might be relevant, it presents a factual dispute that must be resolved at a trial. However, it may be noted that tying arrangements imposed by Fox and other motion picture companies in the 1930's and 1940's are making their effects felt in the current marketplace -- at a time when restraints on competition in the production of feature films and television series are vital and controversial issues.

There are independent companies seeking to produce television series and other programs, and feature films. However, the tying assignments obtained by Fox and other major motion picture producers three and four decades ago prevent these independents from acquiring from authors (bound by those assignments) the renewal rights that would permit production of television or motion picture versions of their books and plays during the renewal copyright terms. The tying assignments thus restrict competition by independents both in the purchase of renewal rights, and in the production of motion pictures and television programs based on outstanding books and plays during their renewal copyrights.

The effects of these restraints may be felt in various ways. Thus, in Columbia Picture Industries et al v. American Broadcasting Companies et al, Judge Palmieri noted:

" A persuasive showing has been made to the effect that feature film product has been for a number of years in a state of continuing and acute shortage leading to a substantial escalation of film licensing costs sustained by the television industry." (1974 Trade Cases, Par. 74, 912; p. 96,094)

(v) The Statute of Limitations Does Not Bar Mrs. Landon's Claims Under Her Second Count

The District Court held that the four year statute of limitations under the antitrust laws [15 U.S.C. 16(b)] began to run with the execution of the 1944 Landon-Fox agreement and barred Mrs. Landon's claims under her second count. We respectfully submit the Court erred.

Mrs. Landon seeks a declaration that she owns the renewal right to make "motion picture versions" because the 1944 attempted assignment of that right to Fox is unenforceable -- having been obtained by an illegal tying arrangement which both violated the antitrust laws and constituted "oppressive circumstances" under Fisher v. Witmark, supra. And since the 1944 assignment of renewal rights is unenforceable, it cannot be recognized as a defense by Fox to Mrs. Landon's first count for infringement of her renewal copyright. The plaintiff also seeks to recover damages for the antitrust violations.

In Fisher v. Witmark, supra, the Supreme Court indicated that when first-term assignments of renewal interests were " made under oppressive circumstances ", these assignments "should be denied enforcement by the courts." 318 U.S. at p. 656.

For the reasons discussed above, an illegal tying arrangement which compels assignment of an author's renewal interests constitutes such "oppressive circumstances". The Supreme Court did not rule that renewal assignments obtained by "oppressive circumstances" only should be denied enforcement until their fourth anniversary, nor did this Court in Rossiter v. Vogel place any such time limit on the doctrine of unenforceability.

Mrs. Landon was not obliged to assert her claim that she owned the renewal motion picture rights because the 1944 assignment was unenforceable, until after her renewal copyright came into being in 1971. Rossiter v. Vogel, et al, 134 F. 2d 908; Carmichael v. Mills Music, Inc., 121 F. Supp. 43. The statute of limitations applicable to this aspect of her claim, under the Copyright Act [17 U.S.C. 116(b)] did not begin to run until the renewal copyright became effective; and this action was commenced well before that period of limitation expired.

In Rossiter v. Vogel, 134 F.2d 908, this Court upheld a claim of unenforceability made after the renewal year began, with respect to a prior assignment of the renewal copyright executed 17 years before. In Carmichael v. Mills Music, Inc., 121 F. Supp. 43, Judge Edelstein held that an author could bring an action for a declaration that he owned the renewal copyrights in various songs although he had previously assigned the renewals to his publisher -- alleging that the prior assignments were unenforceable because of inadequacy of consideration. Three renewal copyrights were already in existence; the original copyrights in the other compositions were obtained 21 or more years before, and the publisher contended the renewal copyrights had been assigned in the publication contracts executed for the original copyrights. As these opinions indicate, the question is not whether the author is barred from bringing the suit more than three years after the first-term assignment of a renewal copyright is executed, but rather whether the author is entitled to commence the suit before he secures the renewal copyright in the 28th year. As Judge Edelstein noted in Carmichael, until

under Northern Pacific or International

then the author possesses only an expectancy; should he die before the 28th year, his widow and children would secure the renewal copyright [by grant under the Copyright Act, and not through inheritance from him], and the motion picture company or publisher which had obtained the prior assignment from him would not acquire any interest in the renewal. Miller Music v Daniels, supra. Technically, as Judge Edelstein indicated, an author might have no standing to assert the claim he owned the renewal copyright (when a prior assignment was unenforceable because made under "oppressive circumstances") until the renewal copyright actually came into being, so that he would be able to take title if his claim prevailed. We submit that this aspect of Mrs. Landon's claim is not barred by any statute of limitations.

Moreover, Fox asks the Court to enforce a renewal assignment allegedly made under "oppressive circumstances", by upholding it as a defense against the first count that Fox infringed Mrs. Landon's renewal copyright in her novel. If Mrs. Landon establishes, at the trial, that the 1944 renewal assignment was compelled by "oppressive circumstances", the unlawful tying assignment, then the court could not enforce the assignment by allowing Fox to assert it as a defense to Mrs. Landon's claim of renewal copyright infringement.

We also believe the District Court erred in assuming the antitrust violation was completed with the execution of the 1944 assignment. We submit that the last act required, was the securing of the renewal copyright in 1971, and Fox's claim of ownership of renewal rights under it.

On the motion for summary judgment, Mrs. Landon contended that the statute of limitations in antitrust actions can only begin to run after a plaintiff becomes able to prove his damages with reasonable certainty. Zenith Radio Corporation v. Hazeltine Research, Inc. 401 U.S. 321; Poster Exchange, Inc. v. National Screen Service Corp., 456 F.2d 662, 666-7. The District Court rejected this argument on the ground that damages suffered by Mrs. Landon from the tying arrangement might be difficult to prove, but were not impossible to prove. We submit the Court was wrong. It is inconceivable that a Court in 1944 could have awarded plaintiff damages based on the value of rights that could not be exercised until they came into being in 1971. Indeed, it is likely that Fox would have defended, and perhaps successfully, in 1944 on the ground that Mrs. Landon could not have standing to sue for damages to those renewal rights until it was certain that she, and not her husband, children, executor or next of kin, would be the owner twenty eight years later in the renewal year. Most certainly Fox would have argued that no damages could awarded, on grounds of uncertainty and speculativeness.

CONCLUSION

It is respectfully submitted that the order granting summary judgment dismissing the complaint should be reversed.

Respectfully Submitted,

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